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No. 94-1388

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHN J. WILEY, ET AL.,

Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are police officers' fifth amendment rights against self-incrimination violated when a police department compels the officers to submit statements under threat of termination to a prosecutor conducting a criminal investigation?

PARTIES IN THE PROCEEDINGS BELOW

U.S.C.A. No. 94-1892

JOHN J. WILEY, Sergeant; CHARLES BEALEFELD, Officer; PAUL B. DEACHILLA, Officer; HARRY VAN CLEAF, Officer; JOSEPH STRUCK Officer; THOMAS TOMSHO, Officer; FRATERNAL ORDER OF POLICE, Baltimore City Lodge 3, Incorporated,

Plaintiffs-Appellants,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE; TIMOTHY DOORY, Individually, and in his official capacity as Assistant State's Attorney for the Baltimore City State's Attorneys Office,

Defendants-Appellees,

and

STATE OF MARYLAND; BALTIMORE POLICE DEPARTMENT; EDWARD J. TILGHMAN, Commissioner of the Baltimore City Police Department; STUART SIMMS, State's Attorney for the Baltimore City State's Attorneys Office,

Defendants.

None of the parties is a private business entity either publicly traded or privately held.

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OPINIONS BELOW

The District Court's opinion of May 20, 1993, captioned as Sergeant John J. Wiley, et al. v. the State of Maryland, et al., appears as Civil Action No. MJG-89-608 (D Md. 1992).

The Fourth Circuit's opinion of the interlocutory appeal

dated January 27, 1994 and captioned as Doory v. Wiley, appears at 414 F.3d 993 (4th Cir. 1994).

The District Court's Memorandum and Order regarding the Mayor and City Council of Baltimore's Motion for Reconsideration, dated June 20, 1994 is the same civil action number as the original district court proceeding.

The Fourth Circuit's opinion of March 3, 1995, captioned as Wiley v. Mayor and City Council of Baltimore, appears at 48 F.3d 773 (4th Cir. 1995).

JURISDICTIONAL STATEMENT

The final judgment of the Fourth Circuit of which review is sought was entered on March 3, 1995. Review is sought by way of a Writ of Certiorari pursuant to Supreme Court Rule 13 and 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V.

"[n]o person...shall be compelled in any criminal case to be a witness against himself..."

STATEMENT OF THE CASE

On December 7, 1987 a shooting incident occurred in which Baltimore City police officer involvement was suspected. A criminal investigation was conducted in order to reveal any information surrounding the incident. Assistant State's Attorney Tim Doory and representatives of the Baltimore City Police Department were involved in every aspect of the investigation.

During December of 1987, Officers Charles Bealefeld, Paul Deachilla and Harry Van Cleaf were interrogated and called before a grand jury to testify about the incident. Sergeant John Wiley was interrogated by Doory and Department representatives in late February or early March.

This was only after the Department had thoroughly interrogated him from December of 1987 until his meeting with Doory. None of the officers was advised of his rights under the United States Constitution or Maryland's Law Enforcement Officer's Bill of Rights. Although the officers were told they were not suspects, they were treated as suspects. The officers were subjected to hours of interrogation, threats of job loss and threats of a grand jury, among other hostile behavior. All of the Petitioners were ordered to submit to a polygraph exam under threat of termination if they failed to obey the order. These orders came at the behest of Assistant States Attorney Doory. Each officer initially refused to submit to the polygraph testing, but eventually submitted to the exam under threat of termination. Actions taken by Doory and the Department directly indicate that the officers were potential suspects.

The results of the polygraph tests indicated that Officers Bealefeld, Deachilla and Van Cleaf were truthful. The results

for Sgt. Wiley were inconclusive. Despite the Department's knowledge that Officers Bealefeld, Deachilla, and Van Cleaf were not involved in the shooting, each officer was subjected to grand jury review. None was indicted.

The officers brought suit in the United States District Court for the District of Maryland against the State of Maryland, the Mayor and City Council of Baltimore, the Baltimore City Police Department and then-Commissioner Edward S. Tilghman, Baltimore City State's Attorney Stuart Simms, and Timothy Doory, individually and in his capacity as assistant state's attorney for Baltimore City. The suit, which was brought pursuant to 28 U.S.C. §§ 2201, 2202 and 42 U.S.C. §1983, claimed violations of the officers' fourth, fifth and fourteenth amendment rights and sought declaratory, injunctive, and monetary relief.

By Order of the Honorable Marvin J. Garbis on October 16, 1993, defendants State of Maryland, Baltimore City state's

attorney Stuart O. Simms, the Baltimore City Police Department, and Police Commissioner Edward S. Tilghman were released from the case by the granting of their respective motions to dismiss. By Order of May 20, 1993, the motions to dismiss of defendants Assistant State's Attorney Tim Doory and the Mayor and City of Baltimore were granted as to all counts except the fifth amendment claims.

Defendant Assistant State's Attorney Doory filed an interlocutory appeal to the United States Court of Appeals for the Fourth Circuit. Doory claimed that his motion to dismiss should have been granted on the basis of qualified immunity as to the police officers' claims for damages pursuant to 42 U.S.C. §1983 and the Self-Incrimination Clause of the fifth amendment.

In the interlocutory appeal, Doory v. Wiley, 14 F.3d 993 (4th Cir. 1994), the Fourth Circuit reversed, holding that defendant Doory did have qualified immunity. Defendant Doory was found to have qualified immunity because the Fourth Circuit

held that at the time of the alleged violation, there was no clearly established law regarding the Plaintiffs' fifth amendment claims.

Following the opinion in Doory v. Wiley, the Petitioners filed a petition for rehearing and suggestion for rehearing en banc. The petition stated as grounds that the Fourth Circuit decided only the qualified immunity issue, but did not decide issues which involved the fifth amendment violations.

In an order denying the petition, the Fourth Circuit declared that it would not decide the fifth amendment compulsion issue. The Court stated: "We decline to decide any question in the case except the one we have mentioned, which was whether or not Doory was entitled to qualified immunity, and we are thus of the opinion the petition for rehearing is without merit, and should be denied."

After remand to the District Court, Respondent Mayor and City Council of Baltimore filed a motion for reconsideration of the order which denied their motion to dismiss on the fifth

amendment claims. In this motion, the City reiterated its position that the officers had no claim under Monell v. New York City Department of Social Services, 436 U.S. 658 (1978) and that the officers' fifth amendment rights were not violated by their claim.

In a memorandum and order dated June 20, 1994, the Court addressed the City's motion for reconsideration. In an effort to preserve judicial economy based on the Doory v. Wiley opinion, Judge Garbis granted both the City's motion for reconsideration, and the City's motion to dismiss. The Court also granted defendant Doory's motion to dismiss.

Judge Garbis held that the City's motion to dismiss on the Monell grounds was properly denied. In addition, Judge Garbis, "regretfully" predicted that, based upon the Doory v. Wiley opinion, the Fourth Circuit would not find the officers' cause of action to be viable. The memorandum stated that ". . .this court disagrees with the Fourth Circuit's interpretation of

the law." The Court also expressed its hope that the Plaintiffs would appeal the fifth amendment issue: " . . . this court hopes that on appeal Plaintiffs can convince the Fourth Circuit to change its apparent position and permit the case to proceed to trial on the merits." The United States Court of Appeals for the Fourth Circuit affirmed the District Court's dismissal and held that no federal constitutional violation occurred. Wiley v. Mayor and City Council of Baltimore, 48 F.3d 773 (4th Cir. 1995)(App. at 1, 15). The Court held that a fifth amendment violation did not occur because "the officers were never asked to waive their constitutional privilege against self-incrimination, and the questions posed to were narrowly job-related." (App. at 12).

REASONS FOR GRANTING THE WRIT

POLICE OFFICERS' FIFTH AMENDMENT RIGHTS AGAINST SELF INCRIMINATION ARE VIOLATED WHEN A POLICE DEPARTMENT COMPELS THE OFFICERS TO SUBMIT STATEMENTS UNDER THREAT OF TERMINATION TO A PROSECUTOR CONDUCTING A CRIMINAL INVESTIGATION.

The issue in the instant case concerning police officers' fifth amendment rights is an important one to every public employee who could one day be affected by the Fourth Circuit's holding in Wiley v. Mayor and City Council of Baltimore. While this Court has decided cases with similar issues, this Court has never considered the unique situation in the instant case in which a police department compels police officers to submit statements, under threat of termination, to a prosecutor conducting a criminal investigation.

The Fourth Circuit's decision is also significant because it is one which is likely to have a recurrent effect. Based on the

number of public employees in our nation, the Fourth Circuit's decision could result in Constitutional rights being stripped from public employees on a daily basis. In addition, as noted by Justice Powell, the Fourth Circuit's holding extends an inconsistency in the Circuits "regarding whether or not a Fifth Amendment violation can occur when the fruits of coerced questioning are not used." (App. at 14-15). Finally, the opinion of the Fourth Circuit results in a prosecutor having an unbridled ability to use a public employer to illegally compel statements from employees for the purpose of a criminal investigation.

A. The Decision of the Fourth Circuit inappropriately characterized the nature of the Defendants' investigation as a mere exercise of the Baltimore City Police Department's right to question employees regarding job performance.

The Fourth Circuit held that the Officers' fifth amendment rights were not violated because the officers "were never asked to waive their constitutional privileges against self

incrimination, and the questions posed to them were narrowly job-related." (App. at 12). The basis of the Fourth Circuit's decision in Wiley v. Mayor and City Council of Baltimore, 48 F.3d 773 (4th Cir. 1995) was its analysis of Garrity v. New Jersey, 385 U.S. 493 (1967), Gardner v. Broderick, 392 U.S. 273 (1968), and Uniformed Sanitation Men A'ssn v. Commissioner of Sanitation, 392 U.S. 280 (1968) (App. at 9-11). While each of these cases is pertinent to "the Fifth Amendment rights of public employees" (App. at 9), none directly addresses the unique issues concerned in the case at bar.

The Garrity case is important in analyzing the instant case because it concludes that duress is inherent when a police officer is forced to choose between his job and self-incrimination, Garrity, 385 U.S. at 498, as was the case with the Petitioners herein. However, Garrity did not analyze the issue regarding at what point the actual fifth amendment violation occurred. Garrity also did not address the relationship between

the fifth amendment and the exclusionary rule.

Gardner v. Broderick is also important because this Court clearly established that the attempt to coerce a statement itself violates the privilege against self-incrimination. Gardner, 392 U.S. at 278-279. Gardner is also illustrative of the important constitutional protections afforded to police officers when they are coerced to make a statement in a criminal setting. The Court concluded "...the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness to coerce a waiver of the immunity it confers on penalty of the loss of employment." Id. at 279. (emphasis added).

Gardner differs from the case at bar in that the officer in Gardner chose to accept termination rather than to testify, whereas the Petitioners in this case submitted to the polygraph exams. However, this action by the Petitioners was not a waiver, but a conscious choice on the part of the Petitioners to

submit to the coercion, then to seek a remedy after the coercion had taken place. From a financial perspective, the officers were not in the position to refuse to take the polygraphs, be terminated, and subsequently seek redress in the courts. So, while Gardner is helpful in establishing that the coercion itself violates the privilege against self incrimination, it does not completely address the issues in the instant case.

Uniformed Sanitation Men A[illegible]n, which is cited concurrently with Gardner in the course of the Fourth Circuit's analysis (App. at 10-11), is of little applicability in considering the instant case. This is because the opinion, while establishing guidelines for public employees being questioned by their employers, in no way addresses the situation in the instant case in which a state's attorney, with the assistance of a public employer, compelled statements not in an internal investigation, but in a criminal investigation.

The Fourth Circuit's concurrent citation of Gardner and

Uniformed Sanitation Men has resulted in a misguided analysis of the issues in the instant case. As mentioned above, Gardner occurred within the context of a criminal grand jury investigation, whereas Uniformed Sanitation Men occurred strictly within the context of an internal investigation. Treating the Uniformed Sanitation Mens' analysis as applying to criminal situations is inappropriate. Likewise, treating the criminal investigation in the instant case as an internal investigation is not warranted by the facts.

It is difficult to comprehend the Fourth Circuit's mischaracterization that "the questions posed to [the officers] where narrowly job-related." (App. at 12). Although the officers were assured that they were not suspects, each was interrogated extensively, was ordered to take polygraphs, and was called to testify before the grand jury (App. at 2). These actions, initiated by an Assistant State's Attorney, Timothy J. Doory, are evidence that the questions being asked of the

officers are not merely "job-related," but, in fact, were part of a criminal investigation. In fact, an assistant state's attorney would have no reason to conduct an internal investigation; that is within the purview of the Department's Internal Investigation Division. Therefore, the Fourth Circuit's treatment of this case as an internal investigation is erroneous; extending cases addressing internal investigations to the criminal setting could virtually strip public employees or their fifth amendment rights.

B. The Fourth Circuit Erred in Ruling a Fifth Amendment Violation Cannot Occur Unless the Fruits of the Coerced Questioning are Used in a Subsequent Criminal Proceeding.

By holding that the Petitioners have failed to allege facts that constitute a fifth amendment violation (App. at 15), the Fourth Circuit has rejected the proposition that a fifth amendment violation occurs at the time that an individual is actually coerced into making a statement. This decision by the

Fourth Circuit has continued an inconsistency in the Federal Circuits regarding whether or not a fifth amendment violation can occur when the fruits of coerced questioning are not later used in court. In Lefkowitz v. Turley, this Court maintained that the purpose of the privilege against self incrimination is "...to ensure that a person should not be compelled, when acting as a witness in any investigation,[1] to give testimony which might tend to show that he himself committed a crime." 414 U.S. 70, 77 (1973) (emphasis added). This Court's use of the "might" implies that whether the government actually elicits or uses the incriminating statement is irrelevant; it is enough that the Defendant was compelled to give testimony. It logically follows that when an individual is actually coerced into making a statement, the fifth amendment is violated. Various circuits have recognized that it is the attempt to compel an incriminating

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[1]This Court's use of the word "any" implies that the privilege extends to both criminal and civil investigations.

statement that violates the fifth amendment, not its subsequent use. The Court of Appeals for the D.C. Circuit in United States v. North distinguished between the constitutional violation and the remedial exclusionary rule:

> We believe -- as do five of our sister circuits, [2] see Maj. Op. at 869-870--that grand jury consideration of evidence already unconstitutionally compelled and grand jury consideration of immunized testimony fall on different sides of this fence. In the former context, such as where Miranda warnings are not given, the constitutional violation occurs independent of the grand jury. Whether the resulting confession can be used derivatively by the grand jury in subsequent proceedings is a matter of the reach of the exclusionary rule, which is a function not of any rights of the defendant but of a remedial balance factoring in the possible unreliability of the confession and the need to deter the government from future violations of Fifth amendment rights.

920 F.2d 940, 948 (D.C. Cir. 1990)(emphasis added). The D.C. Circuit makes it clear that once a statement is compelled, a

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[2]Those circuits are the Eighth, Ninth, Tenth, Eleventh, and District of Columbia Circuits.

constitutional violation has occurred and the subsequent use is irrelevant on that issue.

Similarly, the court in Cooper v. Dupnik, 963 F.2d 1220, 1242 (9th Cir. 1992) (en banc), cert denied, _ U.S. _, 113 S. Ct. 407 (1992), held that mere compulsion may violate the self incrimination clause. In Cooper, the Ninth Circuit, en banc, held that a Plaintiff had a colorable §1983 claim for a violation of the Self-Incrimination Clause by alleging that his statements were compelled, even though they were never used against him in a criminal proceeding. Id. at 1242. Cf. Gray v. Spillman, 925 F.2d 90, 94 (4th Cir. 1991) (holding that the Plaintiff had stated a §1983 claim for violations of the fifth and fourteenth amendments by alleging that he was beaten in an attempt to compel an incriminating statement).

Of equal concern is the fact that the decision of the Fourth Circuit creates the undesirable result of empowering a prosecutor with the ability to coerce citizens into giving

incriminating statements under any threat or intimidation short of physical assault, as long as the prosecutor does not subsequently use that specific statement. The result reached by the Fourth Circuit is especially dangerous in situations where, as in the instant case, there is no statute granting use plus derivative use immunity. Taken to its logical conclusion, the Fourth Circuit's decision would allow the state's attorney's office to coerce a statement from any public employee simply by eliciting that person's employer to compel him under threat of termination.

In terms of its analysis, the Fourth Circuit's decision regarding the presence of a criminal investigation in the instant case also appears to be misguided. The privilege against self-incrimination prevents the government from coercing a potentially incriminating statement from an individual unless that

person is provided with use plus derivative use immunity.[3]

If, as the Fourth Circuit asserts, the violation would not occur until the coerced statements were used in court, then Kastigar's requirement of providing use plus derivative use immunity to the individual prior to compulsion would not be necessary. Kastigar v. United States, 406 U.S. 441, 453 (1972). Under the rationale of the Fourth Circuit, and contrary to the North case, the remedy of the exclusionary rule serves to eliminate the fifth amendment rights of the Petitioners. Thus, Kastigar's requirement that use plus derivative use immunity be

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[3]In the case at bar, the use plus derivative use immunity necessary to render the compelled statements constitutional did not exist. Immunity can only be granted by statute. The only statute which even remotely resembles and grant of immunity in this situation is Md. Code Ann., article 27, section 728 (b)(7)(ii) of the Law Enforcement Officers' Bill of Rights. However, the LEOBR is not coextensive with the fifth amendment protection against self incrimination because it lacks derivative use immunity. Although Assistant State's Attorney Doory arguably could not use the results or statements made during the polygraph examinations against the police officer in a criminal proceeding, there is nothing in the LEOBR which prevents derivative use.

granted to an individual prior to coercing a potentially incriminating statement is rendered surplusage.

The requirement of a grant of use plus derivative use immunity in Kastigar is important for the prevention of violations that the exclusionary rule on its own cannot prevent. Kastigar's requirements prevent a state's attorney from having the ability to force citizens to give incriminating statements under any threat or intimidation short of physical assault, as long as he doesn't subsequently use that statement. The requirement also prevents state's attorney's from using the illegally obtained statements to pursue other leads or to influence the state's attorney's decisions in criminal investigations against the persons whose statements are coerced.

The potentially incriminating nature of compelled polygraph results (or statements made as part of the polygraph proceeding) is especially dangerous in the hands of a prosecutor in a case like the instant one in which there is no derivative use

immunity. In United States v. Pantone the Third Circuit recognized that without derivative use immunity, "mere access to immunized information may catalyze chains of investigation or subliminally affect decisions to prosecute." 634 F.2d 716, 721 (3rd Cir. 1980). See also United States v. McDaniel, 482 F.2d 305, 312 (8th Cir. 1973) (testimony "could not be wholly obliterated from the prosecutors mind").

The Fourth Circuit's decision blurs the distinction between the fifth amendment protection, and the remedial purpose of the exclusionary rule, opening the door for extensive prosecutional abuse.

C. The Decision of the Fourth Circuit Allows a State's Attorney Unbridled Discretion to Use an Employer to Illegally Obtain Compelled Statements From a Public Employee for the Purposes of a Criminal Investigation

The opinion of the Fourth Circuit is based on the conclusion that an act is not illegal unless the perpetrator profits

from his misdeeds. As discussed supra, the Fourth Circuit's decisions allows prosecutors to coerce incriminating statements and then seek to avoid the effects of the exclusionary rule later. The mere fact that coercion took place in a situation such as the instant case should create particular concern. It would be illogical for the state's attorney to compel the statement in the first place if, in fact, he could not make use or derivative use of the statement.

Citing Gardner, the Fourth Circuit emphasized that the "state may compel job-related testimony from an employee in the course of a criminal investigation, provided, of course, that the state does not make direct or derivative use of the employee statement against the employee in any criminal proceeding." (App. at 13, citing Gardner, 431 U.S. at 278; and Garrity, 385 U.S. at 500). The Fourth Circuit also cited Kastagar v. United States, 406 U.S. 441. The court explained further that in certain situations it might be necessary to inform an employee about the

nature and scope of the Garrity privilege, but that in the instant case the need for the explanation was not necessary because "no officer attempted to invoke his Fifth Amendment rights during the polygraph tests." (App. at 13-14n.7). This statement by the Court demonstrates a misunderstanding of the workings of a police department. The Petitioner police officers in this case were employees of a paramilitary organization. The officers had already been threatened with termination from their jobs, and each of the Petitioners felt that an attempt to invoke his constitutional rights could have the effect of disciplinary action. As discussed supra, some officers originally declined to submit to the polygraph examinations, and all were ordered upon threat of termination. To invoke the fifth amendment would result in termination and loss of income. Rather than face that prospect, the officers elected to seek subsequent redress in the courts.

The Fourth Circuit's ruling creates an undesirable result, and also continues an inconsistency among the Circuits. The

inconsistency among the Circuits created by the decision of the Fourth Circuit is an important consideration governing review on a Writ of Certiorari S. Ct. R. 10. In addition, the fifth amendment issue presented in this case is an important question of federal law which has never been settled by this Court.

The Fourth Circuit recognized the inconsistency in the circuits "regarding whether or not a Fifth Amendment violation can occur when the fruits of coerced questioning are not used," but distinguished it from the instant case because police officers were the persons being coerced. The Fourth Circuit held that because the individuals in this case are public officials, "they can make no tenable claim that a fifth amendment violation occurred when the police department merely exercised its legitimate right, as an employer, to question them about matters narrowly relating to their job performance." (App. at 15). By carving out an exception for police, the Fourth Circuit wholly disregards Garrity's mandate that "policemen, like teachers and lawyers,

are not relegated to a watered-down version of constitutional rights." Garrity 385 U.S. at 500.

CONCLUSION

Coercing a police officer to take a polygraph examination under threat of termination without use plus derivative use immunity violates the fifth amendment. Certiorari is desirable in this case because the decision of the Fourth Circuit results in allowing a prosecutor unbridled discretion to use an employer to illegally coerce statements from public employees. These illegal coercions are bound to be recurrent. Additionally, a grant of Certiorari would address the inconsistency among the Circuits regarding the issue of exactly when a fifth amendment violation occurs.

Respectfully submitted

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PUBLISHED
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Plaintiffs-Appellants,

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MAYOR AND CITY COUNCIL OF BALTIMORE; TIMOTHY DOORY, Individually, and in his official capacity as Assistant State's Attorney for the Baltimore City State's Attorneys Office
Defendants-Appellees,

No. 94-1892

and

STATE OF MARYLAND; BALTIMORE POLICE DEPARTMENT; EDWARD J. TILGHMAN, Commissioner of the Baltimore City Police Department; STUART SIMMS, State's Attorney for the Baltimore City State's Attorneys Office,
Defendants.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
M.J. Garbis, District Judge
(CA-89-608-MJG)

OPINION

POWELL, Associate Justice:

This appeal requires us to determine whether four Baltimore City police officers may proceed with a claim that their Fifth Amendment rights against self-incrimination were violated when they were ordered to undergo a polygraph examination as a condition of their continued employment. The district court dismissed the action pursuant to Fed. R. Civ. P. 12(b)(6). We affirm.

I

Because of the procedural posture of this case, we must assume the truth of the factual allegations set forth in the complaint. *See United States v. Currituck Grain, Inc.*, 6 F.3d 200, 202 (4th Cir. 1993). Those allegations are as follows.

On December 7, 1987, a shooting incident occurred in Baltimore. It was suspected that officers of the Baltimore City Police Department were involved. Working with Assistant

State's Attorney Timothy J. Doory, police investigators conducted a probe of the shooting. Their inquiry focused, at least in part, on the four officers who are appellants here: Sgt. John J. Wiley and Officers Charles Bealfield, Paul B. Deachilla, and Harry Van Cleaf. Although these individuals were assured that they were not suspects, they were interrogated extensively and were called to testify before a grand jury.[1]

During the investigation, the four officers were ordered to take polygraph tests. In each instance, they were informed that refusal to take the test would lead to disciplinary action such as suspension or termination of employment. Although

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[1]The complaint does not indicate whether others were also questioned, or whether the case was ever solved.

one officer initially resisted, each ultimately took the polygraph test. The results indicated that three of the officers gave truthful responses; as to the fourth, Sgt. Wiley, the test results were inconclusive. None of the officers asserted, or attempted to assert, his Fifth Amendment rights in connection with the testing.

Although the officers were ordered to undergo the polygraph tests, they were not asked to waive their Fifth Amendment privilege against self-incrimination. Indeed, Sgt. Wiley invoked his Fifth Amendment rights when he appeared before the grand jury. The officers were never charged with any offense, nor were their statements ever used against them.

The officers brought this action under 28 U.S.C. §§2201 and 2202 and 42 U.S.C. § 1983, claiming, *inter alia,* that the compelled polygraph tests violated their Fifth and Fourteenth Amendment rights. Also named as a plaintiff was the Baltimore City Lodge of the Fraternal Order of Police. Although the

complaint originally included a number of parties and claims, previous rulings of the district court and this court pared down the case significantly.[2] The case was further streamlined when, in their brief in the present appeal, Appellants abandoned their claim for damages. Thus, as the case comes to us, the only remaining question is whether Appellants have stated a claim for declaratory and injunctive relief on their core Fifth Amendment theory regarding the compelled polygraph examinations.[3]

In the decision below, the district court answered this

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[2]Our prior ruling, in which we held that the officers' damages claims against Assistant State's Attorney Doory were barred by qualified immunity, is reported at 14 F.3d 993 (4th Cir. 1994).

[3]Our disposition of this issue obviates the need to construe the Maryland Law Enforcement Officers' Bill of Rights, Md. Ann. Code art. 27, §§727-734D (1992). Our holding also disposes of Appellants' pendent state-law theory that the compelled polygraph tests violated Article 22 of the Maryland Declaration of Rights. *See Richardson v. State*, 285 Md. 261, 265, 401 A.2d 1021, 1023-24 (1979) (Article 22 construed *in pari materia* with the Fifth Amendment's Self-Incrimination Clause).

question in the negative. We affirm. Before reaching the merits, however, we must briefly address a pair of preliminary issues.

II

We turn first to the question of standing. Because the officers have abandoned their damages claim, Appellees argue that there is no longer any justiciable controversy. They rely on *Los Angeles v. Lyons*, 461 U.S. 95 (1983), in which the plaintiff sought an injunction against the Los Angeles Police Department prohibiting the use of a particular police maneuver for restraining suspects. The Supreme Court found no justiciable case or controversy on the request for injunctive relief because the plaintiff was unable to show a sufficient likelihood that he would again be subjected to the maneuver.[4] *Id.* at 105. Appellees maintain that the officers likewise are unable to show

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[4]The court found no impediment to standing with respect to the plaintiff's claim for damages. 461 U.S. at 109.

any probability that they will be compelled to undergo a polygraph examination in the future. Thus, they argue, this case is controlled by *Lyons*.

Were the individual offices the sole remaining appellants, we might be inclined to agree. As the case comes before us, however, the Baltimore City Lodge of the Fraternal Order of Police remains a party to the case. In light of Appellants' well-pleaded allegation that the Baltimore City Police Department maintains a policy of requiring officers to take polygraph tests, we think there is a sufficient likelihood, *see Lyons*, 461 U.S. at 105, that some members of the local Fraternal Order of Police will, in the future, be affected by this policy. Accordingly, we find no standing problem here. *See Ward v. Portland*, 857 F.2d 1373, 1377 (9th Cir. 1988); *see generally Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 342-43 (discussing the "prerequisites for 'associational standing'").

III

As noted above, the complaint alleges that the Baltimore City Police Department maintains a policy of compelling officers to take polygraph examinations. The Mayor and City Council of Baltimore, appellees here, argue that they cannot be held liable for this policy because the Department is formally an agency of the State of Maryland, and in fact is legally insulated from the jurisdiction of City officials. *See* Baltimore City Code § 16-2 (1980); Charter of Baltimore City art. II, § 27 (1964); *see also* Lewis, *The Baltimore Police Case of 1860,* 26 Md. L. Rev. 215 (1966) (discussing origins of this arrangement). Appellees further argue that the city is not responsible for the policies of an agency over which it has no statutory control. *See Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1978) (local governments subject to § 1983 liability when "action pursuant to official municipal policy of some nature caused a constitutional tort").

The United States District Court for the District of Maryland has twice rejected this contention, emphasizing the strong practical links between the City and the Department, and also pointing out that the Mayor, by law, appoints the Police Commissioner. *See Hector v. Weglein*, 558 F.Supp. 194, 197-99 (1982); *Wilcher v. Curley*, 519 F. Supp. 1, 3-4 (1980). The Maryland Court of Appeals, acknowledging these decisions, has noted that "under 42 U.S.C. § 1983,...the Baltimore City Police Department might well be regarded as a local government agency." *Clea v. Baltimore*, 312 Md. 662, 670 n.5, 541 A.2d 1303, 1306-07 n.5 (1988).

In this case, we decline to pass upon the merits of the City's argument. The court below did not explore the question in any depth, and the record before us is almost entirely barren on the issue. Thus, we shall simply assume for purposes of this opinion that the City may be held accountable, in a § 1983 action, for the policies of the Baltimore City Police

Department.[5]

IV

We now turn to the merits. Because the district court dismissed the complaint for failure to state a claim, our review is *de novo*. *Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1475 (1992).

As noted in our prior opinion, the Supreme Court has decided three relevant cases involving the Fifth Amendment rights of public employees: *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); and *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280 (1968). In *Garrity*, the first case in the sequence, police officers were compelled, under threat of termination, to answer questions regarding allegations that they

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[5]We note that the Supreme Court recently heard argument in a case presenting a similar issue. *See Swint v. Chambers County Comm'n*, 114 S. Ct. 2671 (1994) (granting Certiorari). In light of our disposition, *Swint* has no effect here.

were involved in "fixing" traffic tickets. 385 U.S. at 494. The Court held that the officers' statements, "obtained under threat of removal from office," could not be used against them in subsequent criminal proceedings. *Id.* at 500; *see also Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977).

In *Gardner* and *Uniformed Sanitation Men*, the Court faced a somewhat different scenario. There, public employees were interrogated about alleged misconduct on the job; when they refused to surrender the protections of the Fifth Amendment, they were fired. *Gardner*, 392 U.S. at 274-75; *Uniformed Sanitation Men*, 392 U.S. at 281-82.[6] The court held that the employees could not constitutionally be given the "Hobson's choice between self-incrimination and forfeiting

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[6]Gardner and some of the workers in *Uniformed Sanitation Men* expressly refused to waive their privilege. Although the other workers in *Uniformed Sanitation Men* merely invoked the privilege, this was tantamount to refusing to waive their protections since *Garrity* had not yet been decided. *See* 392 U.S. at 284.

[their] means of livelihood." *Gardner*, 392 U.S. at 277. Accordingly, it ordered that the employees be reinstated.

The court was careful, however, to preserve the right of a public employer to question an employee about matters relating to the employee's job performance. In *Gardner*, the Court noted that the constitutional violation arose not when the employer compelled the employee to answer job-related questions, but when the employee was required to waive his privilege against self-incrimination. *Id.* at 278. According to the Court's opinion, there would have been no constitutional violation if the employee had been forced to answer "questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof." *Id.* (footnote omitted); *see also Lefkowitz*, 431 U.S. at 806; *Uniformed Sanitation Men*, 392 U.S. at 284. This language strongly indicates that forcing a public employee to

answer potentially incriminating job-related questions does not implicate the Fifth Amendment unless the employee is also compelled to waive his privilege. *See Taylor v. Best,* 746 F.2d 220, 224-25 (4th Cir. 1984), *cert. denied,* 474 U.S. 982 (1985).

Decisions from the Fifth and Eleventh Circuits are in accord with this view. In *Hester v. Milledgeville*, 777 F.2d 1492 (11th Cir. 1985), the court upheld a city's authority to require fire fighters to undergo polygraph examinations intended to ferret out illegal drug use, so long as the employees were not compelled to waive their Fifth Amendment rights. *See also Gulden v. McCorkle,* 680 F.2d 1070, 1074 (5th Cir. 1982), *cert. denied,* 459 U.S. 1206 (1983) ("it is the compelled answer *in combination with* the compelled waiver of immunity that created the Hobson's choice for the employee") (emphasis in original).

Here, the officers were never asked to waive their constitutional privilege against self-incrimination, and the questions posed to them were narrowly job-related. In light of

the foregoing authorities, we conclude that the officers have failed to allege facts that constitute a Fifth Amendment violation.

The officers attempt to avoid this conclusion by arguing that the presence of a criminal investigation in this case is constitutionally significant. We disagree. *Gardner* itself, which involved a police officer's testimony before a grand jury, indicates that the state may compel job-related testimony from an employee in the course of a criminal investigation, provided, of course, that the state does not make direct or derivative use of the employee's statement against the employee in any criminal proceeding. *See Gardner*, 431 U.S. at 278; *see also Garrity*, 385 U.S. at 500; *see generally Kastigar v. United States*, 406 U.S. 441 (1972) (discussing relationship between immunity and privilege against self-incrimination).[7]

---

[7]The *Garrity* immunity is self-executing. *See Hester*, 777 F.2d at 1496; *Gulden*, 680 F.2d at 1075-76. In an appropriate case, it might be necessary to inform an employee

The officers also argue that their Fifth Amendment rights were violated at the time their statements were obtained, despite the fact that the information was never used against them in a criminal proceeding. In our prior opinion in *Doory*, we discussed the argument that use in a criminal proceeding is required before a Fifth Amendment violation occurs. *See* 14 F.3d at 998 & n.11. Our decision, however, was limited to whether the relevant body of law was "clearly established" for qualified immunity purposes.

We recognize that, in cases involving private citizens, there is some inconsistency in the circuits regarding whether or not a Fifth Amendment violation can occur when the fruits of

---

about its nature and scope. *See Gulden*, 680 F.2d at 1075-76. Here, however, the need for an explanation did not ripen because no officer attempted to invoke his Fifth Amendment rights during the polygraph tests. *Cf. United States v. Devitt*, 499 F.2d 135, 141 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975) (*Garrity* protection must be explained before "disciplinary action [may] be taken against the witness for his refusal to testify").

coerced questioning are not used. *Compare e.g., Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir.) (en banc) (use not required), *cert. denied*, 113 S. Ct. 407 (1992), *with Weaver v. Brenner*, 40 F.3d 527, 535 (2d Cir. 1994) (evidence must be used "at any criminal proceeding"). But those cases are distinguishable because they involve private citizens who may claim a generalized right to be free from compelled interrogation by the government. Appellants, by contrast, are public officials. As such, they can make no tenable claim that a Fifth Amendment violation occurred when the Police Department merely exercised its legitimate right, as an employer, to question them about matters narrowly relating to their job performance. Of course, if the state had attempted to make direct or derivative use of the officers' statements against them, *Garrity's* self-executing immunity would have immediately attached. On the facts alleged here, however, we hold that no constitutional violation occurred.

V

For the reasons state, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SERGEANT JOHN J. WILEY, ET AL. *

Plaintiffs

vs. * Civ. Action No.: MJG-89-608

THE STATE OF MARYLAND, ET AL. *

Defendants

* * * * * *

DECIDED: June 20, 1994

MEMORANDUM AND ORDER

The Court has before it Defendant Mayor and City Council of Baltimore's Motion for Reconsideration of the Court's May 20, 1993 Order Denying Its Motion to Dismiss the Fifth Amendment Claims in Counts I and II of Plaintiffs' Complaint. The Court has considered the legal memoranda submitted by the parties and finds a hearing unnecessary to resolve the motion.

I. PROCEDURAL BACKGROUND[1]

On February 28, 1989, Baltimore City Police officers John J. Wiley, Charles Bealefeld, Paul Deachilla and Harry Van Cleaf (collectively referred to as "Plaintiffs") brought this action pursuant to 28 U.S.C. §§ 2201, 2202 (1988 & Supp. 1992), and 42 U.S.C. § 1983 (1988 & Supp. 1991), claiming a violation of their Fourth, Fifth and Fourteenth Amendment rights as a result of their being compelled to participate in polygraph examinations in the course of a criminal investigation.[2] In their suit, Plaintiffs seek

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[1]For purposes of this motion, the Court relies upon the factual background set forth in its Memorandum and Order of May 20, 1993 ("Slip Op."), at 2-3.

[2]These claims constitute Counts I and II of Plaintiffs' Complaint. Two other officer-plaintiffs, Joseph Struck and Thomas Tomsho, also joined in the suit, claiming they suffered identical deprivations, albeit arising out of a different investigation. These plaintiffs' claims constituted Counts III and IV of the Complaint. However, in its Memorandum and Order of May 20, 1993, the Court dismissed all of Struck's and Tomsho's claims. (See Slip Op. at 8-9, 15.) As a result, the Court will not discuss them further.

declaratory, injunctive and monetary relief. In a Memorandum and Order, dated October 16, 1991, the Court granted the motions to dismiss of Defendants the State of Maryland, Baltimore City State's Attorney Stuart O. Simms, the Baltimore Police Department and Police Commissioner Edward J. Tilghman. On May 20, 1993, the Court dismissed Plaintiffs' Fourth Amendment claims against the remaining Defendants, Timothy J. Doory and Mayor and City Council of Baltimore ("the City") (collectively referred to as "the Defendants"), (Slip Op. at 8-9), but denied the Defendants' motion to dismiss as it related to Plaintiffs' Fifth Amendment claims. In the course of its decision, the Court concluded, inter alia: (1) that Plaintiffs sufficiently alleged that their injuries were a result of policy of the City, as that term is used in Monell v. Department of Social Services, 436 U.S. 658 (1978), (id. at 8); (2) that Plaintiffs' allegations that they were forced to undergo polygraph examinations in the course

of a criminal investigation or face job forfeiture were sufficient to state a cause of action under the Fifth Amendment, (id. at 9-11, 15-19); and (3) that Defendant Doory was not entitled to qualified immunity, as his alleged conduct violated the clearly established right against self-incrimination embodied in the Fifth Amendment. (Id. at 20-21).

Doory appealed this Court's determination that he was not entitled to qualified immunity. In a published opinion, the Fourth Circuit reversed, concluding that "the specific constitutional right allegedly violated in this case, if such a right exists, was not clearly established. Thus, appellant Doory is entitled to qualified immunity." Wiley v. Doory, 14 F.3d 993, 998 (4th Cir. 1994). In accordance with this opinion, the Court must dismiss Plaintiffs' Fifth Amendment claims against Doory. The only substantive claims remaining then, are Plaintiffs' claims against the City

for violation of their Fifth Amendment rights.

The City, following the issuance of the Fourth Circuit decision in Wiley, filed a motion for reconsideration of this Court's Memorandum and Order denying its motion to dismiss Plaintiffs' Fifth Amendment claims. Plaintiffs oppose this motion.

II. LEGAL STANDARD

A motion for reconsideration may be made for one of three reasons: "(1) an intervening change in the controlling law has occurred, (2) evidence not previously available has become available, or (3) it is necessary to correct a clear error of law or prevent manifest injustice." Weyerhaeuser Corp. v. Koppers Co., Inc., 771 F. Supp. 1406, 1419 (D. Md. 1991) (applying standard to motion to reconsider a final judgment pursuant to Fed. R. Civ. P. 59(e)).

III. DISCUSSION

A. Timeliness of the City's Motion to Reconsider

In their Supplemental Memorandum, Plaintiffs suggest that the City's motion for reconsideration is untimely under Fed. R. Civ. P. 59 and 60. (Supp. Mem. in Opp. to Mot. for Recons. of Order Den. Mayor and City Counsel of Baltimore's Mot. to Dism. at 2-3.) However, these rules govern parties' efforts to obtain relief from final judgments. A denial of a motion to dismiss clearly is not a final judgment. As a result, the City's motion for reconsideration of the denial of its motion to dismiss is not subject to the constraints of Rules 59 and 60. Accordingly, Plaintiffs' timeliness argument is rejected.

B. Monell

In its motion for reconsideration, the City asks the Court revisit the question of whether Plaintiffs have sufficiently alleged that any injury inflicted upon them

resulted from an ordinance, policy or custom of the City, as required by Monell v. New York City Dep't of Social Services, 436 U.S. 658. The City has failed to establish that there has been an intervening change in the controlling law or a clear error of law necessitating the reconsideration of the Court's denial of this motion to dismiss on this ground. To the contrary, an examination of the Complaint reveals that Plaintiffs adequately allege such a policy on the part of the City. (See Pls.' Compl. at ¶ 2 ("Ordering officers the compelled statements against the maker in a criminal proceeding." Wiley, 14 F. 3d at 996 (citations omitted). Moreover, Justice Powell cited with approval cases from the Fifth and Eleventh Circuits explicitly adopting the above interpretation and listed additional support, including a Fourth Circuit decision, for those circuits' holdings. Id. at 997. Finally, in addressing the only case holding that allegation of the mere compulsion of statements stated a §

1983 claim for a violation of the Self-Incrimination Clause, Justice Powell chose to acknowledge the "persuasive arguments" of the dissents. Id. at 998.

In short, the Fourth Circuit decision in the interlocutory appeal strongly suggests that if presented with this case, which involves only the compulsion of statements, without any alleged compelled waiver of the Fifth Amendment privilege or subsequent use or subsequent use of the statements in a criminal proceeding,[3] the Fourth Circuit would find that no constitutional violation had occurred.

Although this Court disagrees with the Fourth Circuit's interpretation of the law, it cannot, and will not from a judicial economy standpoint, ignore this unmistakable

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[3]As Justice Powell correctly noted: "None of the officers alleges that he asserted, or attempted to assert his Fifth Amendment right. . . . The officers were not compelled to waive their Fifth Amendment rights, no charges were ever brought against them, and their statements have never been used against them." Wiley, 14 F.3d at 994.

indication of the Fourth Circuit's position on this issue. For, to do so would put the parties to the considerable expense of going through trial to obtain an apparently futile judgment. Therefore, the Court concludes that under Fourth Circuit law, the City's alleged participation in compelling Plaintiffs to submit to polygraph examinations by threatening disciplinary action does not state a cause of action for violation of Plaintiffs' Fifth Amendment rights. Accordingly, Plaintiffs' Fifth Amendment claims against the City shall be dismissed.

IV. CONCLUSION

For the foregoing reasons, this Court concludes, regretfully, that the Fourth Circuit will not find Plaintiffs' cause of action to be viable. However, this Court hopes that on appeal Plaintiffs can convince the Fourth Circuit to change its apparent position and permit the case to proceed to trial on the merits. Accordingly:

1. Defendant Doory's Motion to Dismiss is **GRANTED** as to the Fifth Amendment claims in Counts I and II.

2. Defendant Mayor and City Council of Baltimore's Motion for Reconsideration of the Court's May 20, 1993 Order Denying Its Motion to Dismiss the Fifth Amendment Claims in Counts I and II of Plaintiffs' Complaint is **GRANTED**.

3. Defendant Mayor and City Council of Baltimore's Motion to Dismiss is **GRANTED** as to the Fifth Amendment claims in Counts I and II.

4. As there remain no viable claims against any of the Defendants, judgment shall be entered by separate Order.

SO ORDERED this 20th day of June, 1994.

Marvin J. Garbis
United States District Judge

(2)

No. 94-2138

Supreme Court, U.S.
FILED
JUL 27 1995
CLERK

In the

Supreme Court of the United States

October Term, 1995

JOHN J. WILEY, *et al.*,

Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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July 26, 1995

BEST AVAILABLE COPY

COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals for the Fourth Circuit hold correctly that the Fifth Amendment privilege against self-incrimination is not violated by a public employer's compulsion of statements from employees, without compelled waiver of the privilege or immunity and without the use of the compelled statements against the makers in subsequent criminal, administrative or other proceedings?

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No. 94-2138

In the

Supreme Court of the United States

October Term, 1995

JOHN J. WILEY, *et al.*,

Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

In December 1987, the Office of the State's Attorney for Baltimore City and the Baltimore City Police Department conducted an investigation into a shooting incident in which police officer involvement was suspected. The investigation focused, in part, on the four police officers who are petitioners here. During the course of the investigation, the officers were ordered to submit to

polygraph examination. The officers were informed that their failure to submit to the examination could result in disciplinary action, including suspension or termination. Each officer submitted to examination. (App. 2-3.) The officers were also called to testify before the grand jury. (App. 2.) All questions posed to the officers were narrowly job-related. (App. 12.)

At no time during the polygraph examinations did any officer assert, or attempt to assert, his Fifth Amendment rights. Nor were the officers asked to waive their Fifth Amendment rights or the immunities derived from the Fifth Amendment. In fact, one officer, Sergeant John J. Wiley, successfully invoked his Fifth Amendment right against compelled self-incrimination while testifying before the grand jury. None of the officers were charged with any criminal offense and at no time were their polygraph or grand jury statements used against them in a criminal or other proceeding. (App. 3.)

REASONS FOR DENYING THE WRIT

LONG-STANDING DECISIONS OF THIS COURT ANSWER THE QUESTION PRESENTED IN THIS CASE, RENDERING THE GRANT OF CERTIORARI UNNECESSARY.

Because the decision below conforms with prior decisions of this Court, further review of this case is unwarranted. By this Court's decisions in *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); and *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280 (1968), a framework for the analysis of Fifth Amendment issues involving public employees has been established. The lower court analyzed the issue presented in this case within that framework, reaching a result consonant with this Court's decisions and decisions reached in other courts of appeal.

The first case decided, *Garrity*, held that statements provided by a public employee threatened with removal from office for failure to respond cannot later be used against the employee in criminal proceedings. 385 U.S. at 499-500. Essentially, the *Garrity* decision provides use immunity in the circumstance in which a public employee

is coerced into making statements under threat of termination.

Gardner and *Uniformed Sanitation Men* established that an employee may not be compelled to answer questions while at the same time being compelled to waive the immunities inherent in the Fifth Amendment privilege against self-incrimination. *Gardner*, 392 U.S. at 278; *Uniformed Sanitation Men*, 392 U.S. at 284. The *Gardner* Court made clear, however, that there would be no constitutional violation if an employee was forced to answer "questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof." 392 U.S. at 278 (footnote omitted).

Drawn from these cases is the principle that a public employee may be compelled to respond to job-related questions that may incriminate him, but is entitled to immunity under the Fifth Amendment preventing the use of the statements or fruits thereof in a subsequent criminal proceeding against the employee. *Garrity*, 385 U.S. at

499-500. The Fifth Amendment is violated only when a public employee is compelled to respond to questions and to waive the protections afforded by the Fifth Amendment, *i.e.*, use and derivative use immunity, *Gardner*, 392 U.S. at 278; *Uniformed Sanitation Men*, 392 U.S. at 284, or when the compelled statements are used against the employee in a subsequent criminal proceeding. *Garrity*, 385 U.S. at 499-500.

In the present case, the police officers were asked job-related questions under the threat of disciplinary action for refusal to respond. At no point did the officers invoke the privilege against self-incrimination and at no point were the officers asked to waive any protection they had pursuant to *Garrity* and its progeny. Further, the statements made by the offices have never been used against them in a criminal or other proceeding. Therefore, there was no Fifth Amendment violation.

Petitioners assert that the nature of the investigation during which the officers were questioned takes this case outside the scope of existing law. This simply is not true. The *Gardner* case involved compelled grand jury testimony

from police officers during the course of a criminal investigation. 392 U.S. at 274. That Court nevertheless explained that no constitutional violation would have occurred if, as here, the officers had not been compelled to waive their immunity from use of the statements.

THE DECISION BELOW DOES NOT CONFLICT WITH ANY OTHER DECISION OF THE COURTS OF APPEAL.

Petitioners also assert that the mere compulsion of the statements from the officers constitutes a constitutional violation, regardless of the fact that the statements were not used against the officers in subsequent criminal proceedings and regardless of the fact that the officers were not compelled to waive their immunity. On this point, Petitioners assert that the courts of appeal are split. A careful review of the relevant cases demonstrates, however, that no inconsistency or "split" exists.

This Court and the courts of appeal have consistently held that an employer may ask job-related questions to employees under threat of termination.

> Public employees may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their

> official duties if they have not been required to surrender their constitutional immunity.

Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977); *see also, e.g., Gulden v. McCorkle*, 680 F.2d 1070, 1073 (5th Cir. 1982); *United States v. Devitt*, 499 F.2d 135, 142 (7th Cir. 1974); *Confederation of Police v. Conlisk*, 489 F.2d 891 (7th Cir. 1973). Thus, the mere compulsion, through threat of termination, does not constitute a constitutional violation.

The only case cited by Petitioners in which the mere compulsion of statements did constitute a Fifth Amendment violation is factually and legally distinguishable. In *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir.)(en banc), *cert. denied*, 113 S. Ct. 407 (1992), the plaintiff was arrested, taken into an interrogation room, and read the *Miranda* warning. The plaintiff responded that he did not want to speak with the arresting officers and that he wanted to have an attorney present; he repeated this position several times during the interrogation. Despite the plaintiff's requests, the officers continued to question him for several hours in an attempt

to coerce a confession. The officers had planned in advance to interrogate the plaintiff regardless of his invocation of Fifth Amendment rights. The Ninth Circuit held that the plaintiff had articulated a viable 42 U.S.C. §1983 claim based on the Fifth Amendment as well as the Fourteenth Amendment.

The Ninth Circuit explained that the substantive Fifth Amendment right upon which the plaintiff could base a §1983 action arose out of his request to have an attorney present:

> As to a request by a suspect to consult with an attorney, the [*Miranda v. Arizona*, 384 U.S. 436 (1966)] Court was equally clear: "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Id.* at 474. *A request for an attorney is thus regarded as an invocation of the substantive right to remain silent.*

Cooper, 963 F.2d at 1240 (emphasis added); *see also id.* at 1252-53 (Wiggins, J., concurring). The Court also held that the police officers' conduct during the interrogation served as the basis for the plaintiff's substantive due

process claim under the Fourteenth Amendment. *See id.* at 1244-50.

The substantive right that provided a §1983 action to the plaintiff in *Cooper* clearly was not at issue here where the officers did not invoke any Fifth Amendment protections during the questioning. Further, the alternative basis for the plaintiff's claim in *Cooper*, namely a substantive due process violation, is not presented in this case. Thus, *Cooper* is inapposite and does not conflict with the lower court's opinion here.[1]

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[1] Likewise, *Gray v. Spillman*, 925 F.2d 90 (4th Cir. 1991) does not conflict with the decision below as that decision merely holds that the existence of severe physical injury is not a prerequisite to the maintenance of a §1983 action based on Fifth and Fourteenth Amendment violations. The *Gray* court did not discuss the substance of any Fifth Amendment claim the plaintiff, who allegedly was beaten during the course of a police interrogation, could have maintained.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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